IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 408 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ASHOK TRADERS & 2 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KJ SHETHNA for Appellant(s) : 1 - 3.
MS.PANCHAL, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 03/07/2007

ORAL JUDGMENT

Present Criminal Appeal is preferred by the appellants under the provisions of Section 374 of the Code of Criminal Procedure 1973, against the judgment and order of conviction and sentence passed by the

learned Additional and Special Judge, Junagadh in Special Criminal Case No.28 of 1987, on 10th March, 1993, in violation of Clauses 7 of the Fertilizer (Control) Order and thereby committed breach of Sections 7 read with Section 3 of the Essential Commodities Act, 1955. The learned trial Judge has sentenced the appellant No.1 to pay a fine of Rs.1,000/- whereas, the appellants No.2 and 3 were sentenced to undergo simple imprisonment for a period of three months and to pay a fine of Rs.1,000/-, in default thereof, to undergo simple imprisonment for a period of one month.

2. The case of the prosecution is that the appellant-accused No.1 was a partnership firm and accused Nos.2 and 3 were the partners of said firm. It is in evidence that accused No.2-Natvarlal D. Adhia was managing the day-to-day affairs and activity of the firm. In short, the accused Nos.2 and 3 were working in the capacity of partners of accused No.1-Firm, Ashok Traders having its Head quarter at Veraval and were doing the business of chemical fertilizers. On 21st February, 1986, the Agricultural Inspector, Shri M.A.Munshi had visited the business premises of the accused No.1-Firm and

found that accused No.1 was having licence in the form of a registration Certificate to deal in the business of chemical fertilizers for the year 1984-85 and said licence was expired on 31/03/1985. It was obligatory on the part of the accused No.1-Firm to apply for a fresh licence or for its renewal well within the time limit, but had failed to do so. The accused No.1-Firm, therefore, had no licence or permission to deal in the business of chemical fertilizers from 1/4/1985 onwards and despite of this, the accused No.1-firm purchased and sold chemical fertilizers and thereby had committed the offence as stated aforesaid. Undisputedly, the Fertilizer (Control) Order, 1957 has been issued under Section 3 of the Essential Commodities Act, 1985.

3. To prove the charges levelled against the appellants-accused, the prosecution has examined Prosecution Witness No.1, who is an Agricultural Inspector, Bhikhabhai Hirabhai. He is a formal witness. He is the Officer, who had filed the complaint and had tendered the complaint in advance alongwith the order of permission for prosecution which was granted by the authorized Officer. This

witness has admitted that both the partners were doing business of fertilizers by two names, one in the name of Ashok Traders and second in the name of Rachit Enterprise. The godown for fertilizers of both these firms is situated in the place owned by Jadavji Zikabhai. The accused Nos.2 and 3 of the present case are also the partners of Rachit Enterprise.

3.1 Prosecution Witness No.2-Mohmmed Ikbal Abdul Rehman Munshi, is the key-witness who had inspected and visited the business premises of accused No.1-firm. On plain reading of the evidence of this witness, it clearly reveals that accused persons had no permission / authority to deal in the business of chemical fertilizer after 31/03/1985 and accused No.2 in his statement had admitted that, there is no renewal of the licence after 31/03/1985. The evidence establishes beyond doubt on following facts.

i) The accused No.1-Firm had no licence to deal in the business of fertilizers from 1/4/1985 till the same was renewed.

ii) The renewal was not with retrospective effect and the same was renewed by the very Officer, Mr.M.A.Munshi from 21/02/1986. Therefore, the business of fertilizer

between 1/4/1985 and 20/2/1986 can be said to be in violation of above referred clauses of Fertilizer Control Order.

4. Mr.Shethna, learned Senior Counsel has taken me through the various grounds of challenge mentioned in the memo of appeal and has submitted that only on the sole testimony of Mr.M.A.Munshi, Prosecution Witness No.1, the trial Judge ought not to have held the accused guilty because no search or seizure have been made in the present case, as contemplated under the Fertilizer Control Order or under the Criminal Procedure Code. He has further submitted that two bill books were seized by Mr.Munshi but no formal Panchnama of seizure was drawn.

4.1 Mr.Shethna has further submitted that no positive evidence as to sell of fertilizer has been led by the prosecution and the Court cannot look into the dates reflected in the various bills because the said contention has not been proved by any of the independent witness nor they have been tendered formally in the evidence.

4.2 Mr.Shethna, has further submitted that the

finding recorded by the learned trial Judge is based on conjecture and when the complainant himself has renewed licence, the Court ought not to have linked the accused with the crime because the prosecution is supposed to establish the element of *mens rea* as per the ratio laid down in the decision of the Apex Court in case of **Nathulal Vs. State of Madhya Pradesh, reported in A.I.R. 1966 S.C. 43 (VOL. 53 C12).**

5. It is also contended that when Rachit Enterprise is not prosecuted then, it is inferable that the accused persons had authority to deal in the business of fertilizer in the capacity of partners of Rachit Enterprise. The prosecution would therefore have to establish that the stock seized by the complainant for which the detention order was passed belong to Ashok Traders and not to Rachit Enterprise.

6. On close scrutiny of the oral as well as documentary evidence led by the prosecution, the Court do not find any merits in the submission. As such the detention order has been accepted by accused No.2 in the statement recorded by the Court under Section 313 of the Code of Criminal Procedure,

pointing out the incriminating evidence wherein he has admitted that he had no licence for dealing in the business of fertilizers, so far as Ashok Trades is concerned. It would be beneficiary to reproduce the exact words used by the accused No.2 while answering the question put to him at the time of recording his statement under Section 313 of the Code of Criminal Procedure. When the accused was asked that on 21/02/1986 when the complainant had visited the business premises of accused No.1-Firm, no licence was found for the year 1985-86 and the same was not renewed. In reply to this question answer was given by accused no.2 is that, “it is true”. In the same way, the accused No.2 was asked that he was serving with notice on 21/02/1986 which is at Exh.24. The answer was given by accused No.2 is that,“it is true”.

7. So, it is difficult for the Court to accept the argument of Mr.Shethna that the detained stock may be of Rachit Enterprise and the accused persons might be dealing in capacity of partners of Rachit Enterprise and not for Ashok Traders. It is to be noted that no formal Panchnama was required to be drawn because no sample of chemical fertilizer was

seized, only the detention order was passed and the accused were asked not to deal in the business of fertilizers, meaning thereby, the accused cannot deal in the business without renewal of licence. The seizure of bill-book is reflected in the receipt given to accused No.2 and when three crucial documents have come on record which directly corroborates the oral version of the complainant i.e. Exhs. 20, 22 and 24, it will be difficult for the Court to hold that finding arrived at by the learned trial Judge is either perverse or contrary to the settled principles of law. There is no error in appreciating the evidence and therefore the finding of conviction recorded by the learned trial Judge is not required to be reversed, so far as the accused-appellant No.2 is concerned.

8. It is true that prosecution is supposed to prove the element of *mens rea*, but in the present case practically for the whole year i.e., from 01/04/1985 to 21/02/1986, accused persons have indulged in the business of fertilizers so this circumstance is sufficient to infer *mens rea*. The stock detained is also found sufficient for one variety. The stock was 0.705 Metric ton and for the

second variety it was 0.500 Metric ton and therefore this argument is also found convincing.

9. It is true that there is enough force in the argument of Mr.Shethna that accused No.3 has wrongly been held guilty because there is no evidence worth the name under which it is possible to infer that accused No.3 was active in day to day affairs of the firm. On the contrary, the evidence of Mr.Munshi, visiting Agricultural Inspector is that accused No.2 was dealing in the business and was looking after the day to day affairs of the fertilizer business. A partner or Director who is not actively associated with the business of the firm or the company or any other legal person like co-operative society, cannot be linked with the crime and therefore the argument of absence of mens rea can help the accused No.3. It is settled that sleeping partners or inactive directors may not be legally held responsible for criminal wrong that has been committed by either firm or company. So, the conviction qua accused No.3 shall have to be reversed and accused No.3 requires to be acquitted from the charges levelled against him.

10. The alternative argument advanced by

Mr.Shethna is that accused No.2 at least ought to have been given the benefit of Probation of Offenders Act by the learned trial Judge. But, now this Court should grant the benefit of Probation of Offenders Act in the larger interest of justice because now the accused No.2 has grown up to the age of 70 years and in those days he was a patient of diabetic and blood pressure, so also, heart disease. This aspect was also brought up to the notice of the learned trial Judge.

11. In reality, the evidence found to have been proved against the accused No.2 is technical offence. There is no allegation against the accused No.2 about selling of fertilizer of substandard quality and the seized bill-book on the contrary establishes that they were bona-fide dealing in distributing of fertilizers. It is very likely that as both the partners were holding a valid licence for one firm i.e. Rachit Enterprise then, they might have missed in getting the licence renewed qua the appellant-accused No.1-Ashok Traders. Only the accused No.2 had admitted before the learned trial Judge when he was asked a pointed question during his examination under Section 313 of the Code of Criminal Procedure. The

answer given by the accused No.2 should be considered as truthful and transparent answer but after a lapse of about more than 14 years, such a person should not be asked to go to jail.

12. Mr.Shethna, has drawn attention of this Court to a decision of this Court in case of **(The) State of Gujarat Vs. Ganpatbhai Premjibhai Joshi, reported in 1998 (2) G.L.H. 787** where similar question had cropped up before this Court and while answering to this question and dealing with the grievance raised by the State the Hon'ble Court has observed thus:

> ***"4. In the decision reported in AIR 1975 SC 845, almost similar situation was dealt with by Their Lordship and it was a case under the Prevention of Food Adulteration Act and the benefit was decided to be given.***
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> ***5. Here also, it may be seen that 1958 Enactment whereby the formal expression of the legislative will to grant benefit of probation was clarified and expressed and in no uncertain terms, for the Enactments which were already on the Statute Book, necessary, reference has been made in Section 18 to exclude them. Essential Commodities Act, 1958 is not one of the Statues***

referred Commodities Act was very much in force at the time when said Probation of Offenders Act, 1958 came to be enacted, the Parliament, in its wisdom, has chosen not to exclude it.

6. Under the circumstances, even the provision for minimum punishment will not come in the way because benefit of probation has to be given to the offenders under the provisions of Indian Penal Code as well as under the provisions of all other Statutes providing for penal offences unless they are specifically excluded either in the Statute itself or under the provisions of the said Probation of Offenders Act. This being not the position in relation to the offences under Essential Commodities Act, obviously, the decision taken by the Ld. Spl. Judge cannot be said to be, in any manner, wrong."

13. In the cited case, the Court was dealing with the legality and validity of the order of the learned Special Judge, who had granted the benefit of the Probation of Offenders Act to the appellant-accused found guilty of the charge of the offence punishable under the provisions of Essential Commodity Act.

14. Mr.Shethna, in support of his argument has also placed reliance to one judgment in case of

Harivallabha and Another Vs. State of Madhya Pradesh, reported in (2005) 10 S.C.C. 330. He has submitted that in this cited decision the accused was given benefit of Section 360 read with Section 361 of Criminal Procedure Code instead of serving substantive sentence. It would be proper to reproduce the relevant paragraphs of this judgment.

> ***"3. Learned Counsel appearing on behalf of the appellants submitted that the appellants are first offenders and in the facts and circumstances of the case they should have been dealt with under the provisions of Section 360 of the Code of Criminal Procedure, 1973 (for short "the Code") and the High Court reduced the sentence of imprisonment from three years to three months without recording any reasons, as required under Section 361 of the Code, which lays down that for special reasons to be recorded, a court can refuse to release a person on probation of good conduct under Section 360 of the Code. In our view, in the facts and circumstances of the present case, the appellants should have been dealt with under the provisions of Section 360 of the Code.***
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> ***4. Accordingly, the appeal is allowed in part and while upholding the conviction and sentence of fine awarded to the appellants, sentence of imprisonment awarded against them is set aside and the trial Court is directed to deal with them under the provisions of Section 360 of the Code. The appellants, who are on bail, are discharged from the***

liability of bail bonds."

15. It is rightly submitted by Mr.Shethna that issue of presence of *"mens rea"* was otherwise required to be considered by the trial Court. The Apex Court in case of **Nathulal (Supra)** has observed that even in cases under the Essential Commodity Act, (major decision), the prosecution should establish the existence of *mens rea* when the accused is found responsible for not maintaining stock register, etc. At least the trial Court ought to have considered that whether the appellant-accused should be granted the benefit of provisions of Section 360 read with Section 361 of the Code of Criminal Procedure. Enough and reasonable force is found in this submission. In such or similar cases after about lapse of several years the accused may not ask to go to prison because the nature of allegation is neither black marketing nor adulteration. The accused was also not dealing with the fair price shop, so, stringent prohibitory law has not been violated only regulatory provisions were found infringed.

16. So, accepting the ratio the aforesaid decisions and mainly the decision of the Apex Court

in case of **Nathulal (Supra)** and the background of the above stated facts, the Court is inclined to allow the appeal partly.

17. In the result, present Criminal Appeal is partly allowed, so far as original accused Nos.1 and 2-appellant Nos.1 and 2 are concerned. The judgment and order of conviction and fine passed by the learned Additional and Special Judge, Junagadh in Special Criminal Case No.28 of 1987 on 10th March, 1993 in respect of appellant-accused No.1 and 2 is hereby confirmed and the order of substantive sentence is hereby altered, so far as appellant-original accused No.2 is concerned.

17.1 The appellant-accused No.2 is directed to execute a bond of good behaviour with one surety of Rs.5,000/- (Rupees Five Thousand Only) for a period of one year under the scheme of Section 4 of Probation of Offenders Act read with Section 361 of Criminal Procedure Code, 1973. Bond to be executed before the concerned trial Court. The substantive sentence shall remain under suspension till the period of bond of good behaviour i.e. for one year and shall become inoperative on completion of the said period. The above referred bond of good behaviour to be executed within a period of 30 days from today, failing which the trial Court shall issue non-

bailable warrant for arrest of the appellant-accused No.2 and he will be liable to serve the sentence imposed upon him by the trial Court. In case of violation of any of the conditions of the bond of good behaviour executed by the appellant-original accused No.2, the trial Court shall be at liberty to issue warrant for serving the sentence imposed by the concerned trial Court.

17.2 The Bail Bond executed by the appellant-accused No.2 shall stand discharged on the date on which the appellant-accused No.2 executes the bond of good behaviour before the trial Court.

17.3 So far as appellant- original accused No.3 is concerned, the appeal preferred by him is allowed. The judgment and order of conviction and sentence passed by the learned Additional and Special Judge, Junagadh in Special Criminal Case No.28 of 1987 on 10th March, 1993 in respect of appellant-accused No.3 is hereby quashed and set aside. The appellant-original accused No.3 is acquitted from the charges levelled against him. Fine, if paid by the appellant No.3-original accused No.3, is ordered to be refunded to him on proper identification. Bail Bonds executed by the appellant-original accused No.3 shall stand discharged. Order and Direction accordingly.

(C.K.BUCH, J.)

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